Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22-6 OF 1989
CLEMENT SKINNER J
20 FEBRUARY 1999

Civil Procedure *— Pleadings — Striking out — Whether cause of action disclosed in statement of claim — Whether statement of claim may be improved upon by affidavit evidence — Rules of the High Court 1980 O 18 r 19*

Civil Procedure *— Pleadings — Statement of claim — Deficiency in — Whether can be made good by affidavit evidence*

Civil Procedure *— Pleadings — Striking out — Application filed 18 days after pleadings closed — Whether inordinate delay — Rules of the High Court 1980 O 18 r 19*

This action was brought by four plaintiffs against the defendants for losses and damages resulting from the deferment of a development project after a caveat was lodged by the defendants on the land intended for the development. The first plaintiff was a director of the second plaintiff, a company. The second plaintiff lent a sum of money to the third plaintiff (who already owned part of the land) to buy the remaining shares of the land from the fourth plaintiff. The third plaintiff intended to develop the land and had obtained approval from the authorities. The first and second defendants were directors of the third plaintiff who claimed to have been wrongfully removed as directors. To protect their alleged interest, the defendants lodged a caveat on the land, resulting in the development being deferred. The plaintiffs brought an action to recover the alleged loss suffered. The defendants applied to strike out the claim of the first and second plaintiffs under O 18 r 19 of the Rules of the High Court 1980. The application was dismissed by the deputy registrar and the defendants appealed.

Held, allowing the appeal:

(1) The statement of claim must comply with O 18 r 7(1) so that a defendant will know what it is that a plaintiff alleges against him. The plaintiff must state facts sufficient to formulate a complete cause of action (see p 477B–C).

(2) The statement of claim shows that only the third and fourth plaintiffs are the owners of the land and no facts have been pleaded to show that the first and second plaintiffs: (i) claim any right or interest, whether beneficial or otherwise in the land, which have been adversely affected by the defendants' caveat; and (ii) were involved or interested in any way with the development so that the deferment affected them adversely (see p 477E–F).

(3) Although the affidavit filed by the first and second plaintiffs to oppose the striking out application reveals the basis upon which their claim was brought, the affidavit cannot be used to make

good the omission or defect in the statement of claim; *UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 followed (see p 478C–E).

(4) Although the rule that affidavit evidence cannot make good an omission in a statement of claim originated from O 14 applications, it also applies to O 18 r 19(1) applications, as the purpose of the rule is to enforce a basic rule of pleadings that a defendant is entitled to know from the outset what the claim against him is (see p 479A–D).

(5) The 18 days taken by the defendants to file the application was not inordinate delay; *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 followed. This was a plain and obvious case for striking out (see p 480D–G).

[Bahasa Malaysia summary

Tindakan ini dibawa oleh keempat-empat plaintif terhadap defendan-defendan untuk kerugian dan ganti rugi yang diakibatkan oleh penangguhan projek kemajuan selepas satu kaveat telah dimasukkan oleh defendan-defendan di atas tanah yang diniatkan untuk kemajuan itu. Plaintif pertama adalah pengarah kepada plaintif kedua, sebuah syarikat. Plaintif kedua telah meminjam sejumlah wang kepada plaintif ketiga (yang telah memiliki sebahagian dari tanah tersebut) untuk membeli baki bahagian tanah tersebut daripada plaintif keempat. Plaintif ketiga berniat untuk memajukan tanah dan telah mendapat kebenaran daripada pihak berkuasa. Defendan pertama dan kedua adalah pengarah plaintif ketiga yang telah mendakwa bahawa mereka telah disingkirkan secara salah sebagai pengarah. Untuk melindungi kepentingan mereka, defendan-defendan telah memasukkan kaveat di atas tanah itu, mengakibatkan kemajuan projek kemajuan tersebut terpaksa ditangguhkan. Plaintif-plaintif telah membawa tindakan untuk mendapatkan ganti rugi yang dialami. Defendan-defendan telah memohon untuk membatalkan tuntutan plaintif pertama dan kedua di bawah A 18 K 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan tersebut telah ditolak oleh timbalan pendaftar dan defendan-defendan telah merayu.

Diputuskan, membenarkan rayuan:

(1) Pernyataan tuntutan mestilah mematuhi A18 K7(1) agar seorang defendan akan mengetahui apa yang dinyatakan oleh plaintiff terhadapnya. Plaintif tersebut mesti menyatakan fakta-fakta yang mencukupi untuk merumuskan satu kausa tindakan yang lengkap (lihat ms 477B–C).

(2) Pernyataan tuntutan tersebut menunjukkan bahawa hanya plaintif ketiga dan keempat adalah tuan punya tanah tersebut dan tiada fakta telah diplidkan untuk menunjukkan bahawa plaintif-plaintif pertama dan kedua: (i) menuntut apa-apa hak atau faedah, sama ada benefisial atau sebaliknya di dalam tanah tersebut, yang telah

A dijejaskan oleh kaveat defendan; dan (ii) telah terlibat atau berkepentingan dalam apa-apa cara dengan kemajuan tanah tersebut di mana penangguhan telah menjejaskan mereka secara buruk (lihat ms 477E–F).

(3) Walaupun afidavit tersebut yang telah difailkan oleh plaintiff-plaintif pertama dan kedua untuk menentang permohonan pembatalan mendedahkan dasar tuntutan yang dibawa oleh mereka, afidavit tersebut tidak boleh digunakan untuk membaiki ketinggalan atau kecacatan di dalam pernyataan tuntutan (lihat ms 478C–E)

(4) Walaupun peraturan bahawa keterangan afidavit tidak boleh membaiki suatu ketinggalan di dalam pernyataan tuntutan adalah berpunca daripada permohonan A 14, ia juga terpakai kepada permohonan A 18 K 19(1), kerana tujuan peraturan tersebut adalah untuk menguatkuasakan suatu peraturan asas pliding bahawa seorang defendan adalah berhak untuk mengetahui pada permulaan apa tuntutan yang dibawa terhadapnya (lihat ms 479A–D).

(5) Lapan belas hari yang diambil oleh defendan-defendan untuk memfailkan permohanan mereka bukanlah kelewatan yang melampau; *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 diikut. Ini adalah suatu kes yang mudah dan jelas untuk pembatalan (lihat ms 480D–G)

Notes

For cases on striking out pleadings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3636–3811.

Cases referred to

Bruce v Odhams Press Ltd [1936] 1 KB 697 (refd)
Hsu Seng v Chai Soi Fua [1990] 1 MLJ 300 (folld)
Jamir Hassan v Kang Min [1992] 2 MLJ 46 (folld)
Kang Kok Kwong v Bukit Baru Centre Sdn Bhd & Ors [1991] 1 CLJ 343 (folld)
Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (folld)
Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607 (refd)
UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (folld)
UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 (folld)

Legislation referred to

National Land Code 1965 s 206(3)
Rules of the High Court 1980 O 14, O 18 rr 7(1), 19(1)(a), (b), (d)

Modeshanantham s/o S Velupillai (*Yee, Nantham, Leong & Partners*) for the plaintiffs. A

Chan Yoke Meng (*Kula & Associates*) for the defendant.

Cur Adv Vult

Clement Skinner J: This appeal raises two rather basic but essential points concerning pleadings. Firstly, in instituting proceedings against another, what a plaintiff must show in his pleadings to enable him to bring and maintain an action. Secondly, if the statement of claim is found to be lacking or deficient, whether affidavit evidence can make good such deficiency. There are four plaintiffs in this suit but objection has been taken only against the claim of the first and second plaintiffs. For convenience, I shall therefore continue to refer to the appellants as the defendants and to the respondents as the first and second plaintiffs in this appeal. B C

The facts of this case are as follows. The third plaintiff, a company duly incorporated with limited liability, is the owner to the extent of $^{23}/_{32}$ undivided shares in a piece of Malay reserve land in Kuah, Langkawi, Kedah ('the said land'). The fourth plaintiff, an individual, is the owner of $^{9}/_{32}$ undivided shares in the said land. The first plaintiff, an individual, is a director of the second plaintiff which is a company duly incorporated with limited liability. The second plaintiff is said to have lent RM900,000 to the third plaintiff to enable the latter to purchase the undivided shares in the said land and agreed to repay the second plaintiff RM1.2m by 7 November 1997. The third plaintiff intends to develop the said land into a hotel cum office complex and has obtained approval for that purpose from the local authorities. The first and second defendants are individuals who claim to have been directors of the third plaintiff but who were allegedly wrongfully removed as such directors. To protect their alleged interest, the defendants lodged a caveat against the whole of the said land as a result of which, the plaintiffs claim the development of the said land had to be deferred, causing them loss and damage quantified at RM10m. The plaintiffs have since applied for and obtained the removal of the defendants' caveat against the said land. The plaintiffs now bring this suit in respect of the alleged loss suffered. D E F G

On 28 October 1998, the defendants applied to strike out the claim of the first and second plaintiffs under O 18 r 19(1) Rules of the High Court 1980 ('the RHC') as disclosing no cause of action or that it is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court. The application was heard by the deputy registrar but dismissed. Hence this appeal. H

The statement of claim is to be found specially endorsed on the writ of summons. Order 18 RHC deals with pleadings generally and by r 7(1) provides that:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which these facts are to be proved, and the statement must be as brief as the nature of the case admits. I

In *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at p 712, Scott LJ said:

> ... The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad ... .

It should hardly need stating then that the basic purpose of O 18 r 7(1) is to enable a defendant to know what it is that a plaintiff alleges against him and in doing so, the plaintiff is obliged to state facts sufficient to formulate a complete cause of action.

It will be seen from a reading of the statement of claim that this whole action arises out of the defendants having lodged a caveat against the said land. Paragraph 9 of the statement of claim states that as a result of the caveat, development of a hotel cum office complex on the $^{23}/_{32}$ undivided shares of the said land had to be deferred as a result of which the plaintiffs suffered financial loss and damages.

However, the statement of claim shows that only the third and fourth plaintiffs are owners of the said land and no facts have been pleaded to show that the first and second plaintiffs claim any rights or interests, whether beneficial or otherwise, in the said land and which rights or interests have been adversely affected by the defendants' caveat. Likewise, in respect of the development on the said land, no facts have been pleaded to show that the first and second plaintiffs were involved or interested in any way with such development so that the alleged deferment of plans to develop the said land has adversely affected them.

On what basis then do the first and second plaintiffs bring this claim? In so far as the first plaintiff is concerned, it is pleaded that he is a director of the second plaintiff. Assuming this to be so, no other facts have been pleaded to show why that office entitles him to bring this action in his personal capacity against the defendants for having lodged a caveat against the said land, or how that office entitles him to claim an interest in the said land or the development project planned thereon.

As regards the second plaintiff, para 7 of the statement of claim shows it lent RM900,000 to the third plaintiff company who agreed to repay to the second plaintiff RM1.2m on or before 7 November 1997. Nothing more is stated about the loan. No facts have been pleaded to show why the granting of a loan would entitle the second plaintiff to bring this action against the defendants for lodging the caveat against the said land. If at all, what the pleaded facts show is that the second plaintiff has a cause of action against the third plaintiff for failure to pay RM1.2m by 7 November 1997 as promised.

Thus, from what is pleaded by the first and second plaintiffs, I have no difficulty in holding that the statement of claim has failed, in so far as it concerns them, to state facts sufficient to show any, let alone formulate a complete cause of action against the defendants and is to that extent deficient.

The question that next arises is whether the deficiency referred to above can be made good by affidavit evidence. The application to strike out is made under sub-rr (a), (b) and (d) of O 18 r 19(1) RHC and therefore the parties are not precluded from referring to affidavit evidence.

The first and second plaintiffs have filed an affidavit to oppose the striking out application. It was affirmed by the first plaintiff on 7 September 1998 and filed herein on 8 September 1998 ('the first plaintiff's affidavit'). A

It is this affidavit that reveals the basis upon which the first and second plaintiff's claim is brought. Paragraph 7 of the first plaintiff's affidavit states that the second plaintiff gave the said loan to the third plaintiff to pay for the cost of the said land. The first plaintiff then avers that: 'I have an interest in the said suit to protect my interest and the interest of the second plaintiff who has the beneficial interest on the land registered in the name of the third plaintiff'. The first plaintiff goes on in para 10 of the said affidavit to aver that: 'the first and second plaintiffs have the beneficial interest to the land and have been rightly cited as a party to the suit'. B C

It is obvious from the contents of the first plaintiff's affidavit that the first and second plaintiffs seek to claim a 'beneficial' interest in the said land because the second plaintiff gave a loan to the third plaintiff to purchase the said land. As I have said, this was not pleaded in the statement of claim.

There has been a consistent line of authorities to the effect that an omission or defect in a statement of claim cannot be made good by affidavit evidence. In *UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, the Federal Court in considering an appeal arising from an application for summary judgment under O 14 RHC stated, per Raja Azlan Shah Ag LP (as His Highness then was) that: D E

> ... we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1982] 2 QB 14 where Mathew J, said that: 'it is most important that a defendant should know from the writ what the claim against him is'.

What was stated in *UMBC v Palm & Vegetable Oils* has been applied in the following cases. F

In *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418, Zakaria Yatim J, (as he then was) in striking out a defence under O 18 r 19 on the ground that it was a sham, refused to consider an affidavit filed to improve the statement of defence.

In *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177, Haidar J (as he then was) refused to grant summary judgment on an O 14 application against a defendant because the plaintiff did not plead sufficient facts to entitle the plaintiff to claim a right created by statute. The learned judge refused to allow the plaintiff to rely on an affidavit filed for the purpose of improving the statement of claim. G H

In *Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 300, Haidar J (as he then was) in allowing an O 18 r 19 application to strike out a defence, refused to allow the defendant to make good omissions in the defence by affidavit evidence.

In *Kang Kok Kwong v Bukit Baru Centre Sdn Bhd & Ors* [1991] 1 CLJ 343 Wan Adnan bin Ismail J (as his Lordship then was) struck out the writ and statement of claim against four out of five defendants under O 18 r 19 and in doing so held that the statement of claim did not disclose any complaint against the four defendants, and an affidavit sworn to make I

A allegations which were not made in the statement of claim could not make good the omission in the statement of claim.

I have referred to the above cases to show that although the rule that affidavit evidence cannot make good an omission in a statement of claim or defence finds its origins in cases involving applications for summary judgment under O 14 RHC, it has also been applied without hesitation in applications under O 18 r 19 RHC.

I respectfully agree with the above cases in their application of the rule, especially in relation to O 18 r 19(1) RHC applications. For myself, I see no reason to restrict the application of the rule to applications for summary judgment only. It is my view that the purpose of the rule is to enforce a basic rule of pleading, namely, that a defendant is entitled to know from the outset what the claim against him is. If that be so, it should not make a difference whether the attack to the statement of claim arises in an O 14 RHC or O 18 r 19(1) RHC situation. A further reason for applying the rule in O 18 r 19(1) RHC situations is to prevent the very object of pleadings as found in O 18 r 7(1) from being rendered nugatory, thereby opening the way to vexatious litigation and abuse of process where claims or defences may be simply filed without the opposing party really knowing what is truly alleged until a challenge is mounted and only then being supplied with facts.

For the above reasons I hold that the matters stated in the affidavit of the first plaintiff cannot be relied upon to make good the omissions in the statement of claim so as to clothe the first and second plaintiffs with a cause of action against the defendants.

If I am wrong in what I say above and I am obliged to consider the contents of the first plaintiff's affidavit, I find that what is stated therein do not remedy the omissions in the statement of claim for reasons that follow.

As far as the first plaintiff is concerned, it should be noted that it is the second plaintiff that gave the loan to the third plaintiff. The first plaintiff is only a director in the second plaintiff, yet by paras 7 and 10 of his affidavit he claims an interest in the suit and a beneficial interest in the said land. However, apart from the bare assertions made, no facts have been stated to show how that interest arises or what enables the first plaintiff to bring this suit in his personal capacity. It was stated in submissions by learned counsel for the first plaintiff that as a director of the second plaintiff, he has control of the second plaintiff and has to safeguard the affairs of the second plaintiff. It was also said that the second plaintiff has authorised the first plaintiff to sue, but without any averment in the first plaintiff's affidavit to the above effect. Even assuming all that is said is correct, I find those facts still do not disclose any cause of action against the defendants.

As regards the second plaintiff, the affidavit states that the second plaintiff claims a beneficial interest in the said land because it granted a loan to the third plaintiff to purchase the land. To me, the grant of a loan simpliciter will not, without more, create a beneficial interest in the said land in favour of the second plaintiff. Something more must be shown, for example, that the loan was granted to the third plaintiff to purchase the said land on behalf of both the first and second plaintiffs.

Although not stated in the statement of claim or in the first plaintiff's affidavit, it was argued by learned counsel for the first and second plaintiffs during submissions that as the third and fourth plaintiffs had promised to develop the said land and repay the said loan, this created an interest in the said land in favour of the second plaintiff by virtue of the operation of s 206(3) of the National Land Code ('the NLC'). With respect, I do not see how a promise by the third plaintiff to develop the said land so that it can repay a loan taken from the second plaintiff would attract the provisions of s 206(3) of the NLC to create an equitable interest in the said land in favour of the second plaintiff. As I observed earlier, no facts have been pleaded to show that any transaction had been entered into between the second plaintiff and the third plaintiff whereby it can be said that the second plaintiff had acquired any form of interest in the said land. I therefore hold that s 206(3) of the NLC does not afford the second plaintiff any cause of action against the defendants.

For completeness, I wish to deal with an objection by learned counsel for the first and second plaintiffs that the defendants did not come to court promptly with their application. I do not agree. The application was made 18 days after the defence was filed and therefore before the pleadings were deemed to be closed. In the case of *Jamir Hassan v Kang Min* [1992] 2 MLJ 46, it was held that whereas an application to strike out under O 18 r 19 should be made promptly, it can generally be made before pleadings are closed. In any event, in the circumstances of this case, I do not consider a period of 18 days as inordinate delay. I therefore find this objection is without merit.

In opening his submissions, learned counsel for the plaintiffs pointed out that the summary jurisdiction of the court to strike out under O 18 r 19 should be exercised only in plain and obvious cases and referred to the case of *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607 where the Court of Appeal per Ahmad Fairuz JCA quoted Raja Azlan Shah J (as he then was) in *Mooney & Ors v Peat, Marvick, Mitchell & Co & Anor* [1967] 1 MLJ 87 that 'so long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out'.

For all the reasons given above, I find this is a plain and obvious case for striking out. The claim of the first and second plaintiffs is patently unsustainable. To me, for the first and second plaintiffs to have brought this action and to claim a sum of RM10m as liquidated damages without having any cause of action against the defendants is not only frivolous and vexatious but constitutes an abuse of process and their claim must be struck out which I now do with costs. The defendants' appeal is accordingly allowed and the order of the deputy registrar is set aside. The claim of the third and fourth plaintiffs of course remains intact.

Appeal allowed. Claim of first and second plaintiffs struck out.

Reported by Lynette Tan Ping